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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALAN MASTERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do consecutive maximum twenty year sentences for racketeering and racketeering conspiracy convictions that involve identical conduct violate the Fifth Amendment prohibition against double punishment for the same offense?

2. Do consecutive maximum twenty year sentences for a pre-Guidelines racketeering conviction and a Guidelines racketeering conspiracy conviction violate the Sentencing Guidelines where:

(a) the Guidelines prohibit consecutive sentences for conspiracy and the object of the conspiracy; and

(b) the Guidelines' goal of punishing post-November 1, 1987 conduct is not served because no conduct occurred after the Guidelines' effective date

except for the continued concealment of the conspiracy?

3. Is the Due Process Clause of the Constitution violated by a sentencing judge's finding that the Sentencing Guidelines mandate a consecutive maximum twenty year sentence instead of a concurrent five year sentence where:

(a) the judge's decision is based on a factual finding by only a preponderance of evidence; and

(b) the finding is based on conduct that the jury found the defendant did not commit?

PARTIES TO THE PROCEEDINGS

Petitioner Alan Masters was defendant-appellant before the United States Court of Appeals for the Seventh Circuit. Respondent before this Court, the United States of America, was plaintiff-appellee below and commenced the prosecution against Petitioner.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SEVENTH CIRCUIT

The Petitioner, Alan Masters, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 978 F.2d 281, and is reproduced in the Appendix to this Petition at pages A-1 - A-32.

JURISDICTIONAL STATEMENT

On October 14, 1992, the United States Court of Appeals for the Seventh Circuit affirmed Petitioner's sentence. On November 9, 1992, the Court of Appeals denied rehearing and rehearing en banc.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the Constitution of the United States:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law....

28 U.S.C. Section 994(1)(2):

> The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect...the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

Sentencing Guidelines Sections 2A2.1 (1988 version), 3D1.2, 5G1.1, and 5G1.2 are set out in the Appendix at A-34 - A-38.

STATEMENT OF THE CASE

I. Proceedings before Remand for Resentencing

Petitioner was charged in June 1988 in a four-count indictment that alleged violations of 18 U.S.C. Section 1962(c), 1962(d), and 1341. (R. 1). The district court had jurisdiction over Petitioner's case under 18 U.S.C. Section 3231.

Count One charged Petitioner and two others with racketeering, i.e. being a member of an association-in-fact enterprise which committed certain racketeering acts. Racketeering Act Number Five of Count One charged that Petitioner (a) planned and solicited the murder of his wife, Dianne Masters; (b) conspired with others to murder, and procured and aided and abetted the

murder; and (c) participated in concealing the murder. (R. 1). Racketeering Acts One through Four alleged bribery violations, and Number Six alleged mail fraud stemming from Petitioner's obtaining proceeds from his wife's life insurance policy. (R. 1).

Count Two charged Petitioner and the same two others with racketeering conspiracy, and incorporated the same enterprise and the same pattern of racketeering acts set out in Count One, including the homicide of the Petitioner's wife. (R. 1)

Counts Three and Four charged Petitioner with mail fraud in that he made false statements on a claim for proceeds from the insurance policy in his wife's name. (R. 1) The government

alleged that Petitioner's statement on the claim that the cause of his wife's death was under investigation was false because Masters had himself killed his wife.

The indictment described the alleged racketeering enterprise which was charged identically in Counts One and Two, as follows: "Defendants ALAN MASTERS, MICHAEL J. CORBITT and JAMES D. KEATING, and the Law Offices of ALAN MASTERS, P.C., the Willow Springs Police Department [Corbitt's employer], and the Cook County Sheriff's Police Department [Keating's employer] formed and were an association-in-fact and constituted an enterprise as that term is defined in Title 18 United States Code, Section

1961(4)...."

The jury found Petitioner guilty of Counts One and Two and not guilty of Counts Three and Four. (R. 165, 166)

The jury returned a special verdict on Counts One and Two. (R. 165) The special verdict on Count One listed all six Racketeering Acts and subdivided Number Five into (a), (b), and (c). Number Six was subdivided into six parts, corresponding to the six mailings that were in furtherance of the alleged mail fraud conduct (charged in Counts Three and Four)(R. 165).

In pertinent part the special verdict stated: "In finding defendant Alan Masters GUILTY of Count One of the Indictment, we find beyond a reasonable doubt that he committed the following

checked Racketeering Activities of the charged enterprise...." (R. 165) The jury checked Numbers One through Four and part (a) of Number Five (charging the solicitation to murder Dianne Masters). (R. 165) The jury did not check parts (b) and (c) of Number Five (charging the murder of Dianne Masters and concealment of her death) or any of the six parts of Number Six (the mailings regarding insurance). (R. 165) The special verdict for Count Two (RICO conspiracy) did not subdivide Numbers Five and Six; consistent with its verdict on Count One, the jury checked Numbers One through Five and did not check Number Six. (R. 165)

In a forfeiture hearing held after the

return of the jury verdicts, the jury was asked to find but did not find against Masters on the special forfeiture verdict regarding property of Dianne Masters that Petitioner gained upon her death and which the government contended he should forfeit because he procured her murder. (R. 165).

On appeal, the Court of Appeals affirmed Petitioner's convictions on Counts One and Two. See United States v. Masters, 924 F.2d 1362 (7th Cir.), cert. denied, 111 S.Ct. 2019 (1991). In rejecting one of Petitioner's challenges to an evidentiary ruling by the district court, recognizing the jury's decision, the court stated: "And if there was error here, it was harmless, since it went to a charge -- conspiracy to murder,

as distinct from conspiracy to solicit and conceal -- on which the defendants were acquitted." Id. at 1368. The court also vacated Petitioner's sentence on Count Two (the racketeering conspiracy count) and remanded the case to the district court to make a finding as to whether the conspiracy extended past November 1, 1987, thus requiring that the conspiracy count be sentenced under the Sentencing Guidelines. Id. at 1369.

II. Resentencing Hearing

The parties did not dispute that the government had alleged a conspiracy that extended past November 1, 1987. (R. 279) The district court found that an offense level of 43 (life imprisonment) would apply to resentencing Petitioner on Count

Two. (R. 289) The district court explained that Level 43 was the applicable offense level because, despite the jury's verdict, he found by a preponderance of the evidence that Petitioner was liable for the murder of his wife. (R. 302 at 9) Thus, the court ruled that Section 2A1.1 of the Sentencing Guidelines, which governs first degree murder, applied to Petitioner's case. (R. 302 at 9-10).*

Finally, the district court ruled that, to vindicate the Guidelines, the sentence on Count Two, based on the statutory maximum of a life sentence on an offense level of 43, must be a twenty-

*The district court said that he would reach Level 43 by two alternate routes, which are explained in the appellate court's opinion, that are not pertinent to this writ.

year sentence to run consecutively to the previously imposed 20 year maximum sentence on the pre-Guidelines racketeering conviction. (R. 302 at 71).

III. Court of Appeals Decision Following Resentencing

On October 14, 1992, the United States Court of Appeals for the Seventh Circuit affirmed the Guidelines sentence imposed on Count Two. See 978 F.2d 281 (opinion reproduced in Appendix at A-1 - A-32). On November 9, 1992, the Court of Appeals denied rehearing and rehearing in banc.

In its opinion, the Court of Appeals held that the district court properly found that Section 2A1.1, which applies to murder and carries a base offense level of 43, was the appropriate guideline section for Count Two. See 978

F.2d at 284. (A-10 - A-13). The Court also upheld the district court's decision to run the Guidelines sentence consecutive to the pre-Guidelines sentence, citing Section 5G1.2(d), which governs sentencing on multiple counts of conviction under the Guidelines. See id. (A-11).

The Court of Appeals next rejected Petitioner's argument that consecutive maximum sentences for racketeering and racketeering conspiracy violate the Double Jeopardy Clause. Id. at 285. (A-15 - A-18). Citing United States v. Felix, ___U.S.___, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992), the court claimed that separate punishment for choate and inchoate crimes always is permissible.

Id. (A-15 - A-16) Citing Missouri v. Hunter, 459 U.S. 359 (1983) and Albernaz v. United States, 450 U.S. 333 (1981), the court also contended that cumulative punishment at a single trial never violates the Double Jeopardy Clause. Id. (A-16)

The Court of Appeals next ruled that the jury's finding that Petitioner did not conspire to murder and conceal the murder of his wife did not bar the district judge from finding that Petitioner was responsible for the murder and basing Petitioner's sentence on that finding. 978 F.2d at 285. (A-19 - A-22).

Finally, the court rejected Petitioner's call for a standard of proof greater than a preponderance of evidence when the factual findings at sentencing

result in dramatic increases in the length of sentence. The court recognized that its holding conflicted with United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), but opined that Kikumura is inconsistent with McMillan v. Pennsylvania, 479 U.S. 79 (1986). See id. (A-22 - A-25).

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Uncertainty as to Whether the Double Jeopardy Clause Permits Consecutive Sentences for Multiple Convictions Based on Identical Conduct.

Petitioner was sentenced to two consecutive twenty-year maximum sentences for racketeering and racketeering conspiracy. The conduct that violated the racketeering statute (18 U.S.C. Section 1962)(c)) was the identical conduct that violated the racketeering conspiracy statute (18 U.S.C. Section 1962(d)). The Court of Appeals claimed that decisions of this Court foreclose Petitioner's argument that consecutive sentences violated the Double Jeopardy Clause. See United States v. Masters, 978 F.2d 281, 285 (7th Cir. 1992)(citing United States

v. Felix, ___U.S.___, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992); Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981); Blockburger v. United States, 284 U.S. 299 (1932))(A--15 - A-17). Petitioner asserts that if these decisions are to be interpreted as permitting consecutive sentences for identical conduct charged under multiple statutes, then those decisions of this Court are in conflict with Jeffers v. United States, 432 U.S. 137 (1977), Heflin v. United States, 358 U.S. 415 (1959), and Prince v. United States, 312 U.S. 322 (1957). In addition, the lower court's decision is in conflict with United States v. Scarano, 975 F.2d 580 (9th Cir. 1992), United States v. Niven, 952 F.2d 289 (9th Cir. 1991) and

United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981) in assessing the double jeopardy ramifications of consecutive sentences for identical conduct. This Court should grant certiorari in Petitioner's case to resolve these conflicts and the uncertainty as to when consecutive sentences are permitted.

Although the Court of Appeals asserts that the decisions of this Court unquestionably reject a double jeopardy challenge to consecutive sentences for racketeering and racketeering conspiracy, several decisions of this Court in fact support Petitioner's position. As a starting point, the Double Jeopardy Clause of the Fifth Amendment "protects

against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The test for determining whether conduct can be punished twice was stated in Blockburger v. United States, 284 U.S. 299, 304 (1932): "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." This Court more recently has explained that the assumption "underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes." Whalen v.

United States, 455 U.S. 684, 692 (1980). "Accordingly, where two statutory provisions proscribe 'the same offense,' they are construed not to authorize cumulative punishment in the absence of a clear indication of contrary legislative intent." Id.

Although the Blockburger analysis examines the statutory elements of two offenses, this Court often has looked to the actual offenses charged and to the government's evidence in determining the propriety of cumulative punishment. In Jeffers v. United States, 432 U.S. 137 (1977), this Court barred consecutive sentences for violations of Sections 846 (conspiracy) and 848 (continuing criminal enterprise) of Title 21 of United States

Code. This Court looked beyond the statutory elements to the common law meanings of "conspiracy" and "concerted action" and to the government's actual evidence. See 432 U.S. at 147-57 & n.16. This Court held that the requirement of "concerted action" necessarily requires "proof of an agreement among the persons involved in the continuing criminal enterprise." 432 U.S. at 150. Even though Section 848 does not on its face require a conspiracy or an agreement, this Court held that the common meaning of the phrase "in concert" is agreement or cooperative action. See id. at 148-49 & n.14; see also United States v. Turkette, 452 U.S. 576 (1981)(association-in-fact racketeering enterprise is a "group of persons

associated together, for a common purpose of engaging in a course of conduct"). In the instant case Petitioner was charged with being a member of an association-in-fact racketeering enterprise.

This Court had earlier applied the same double jeopardy analysis in invalidating consecutive sentences under the federal bank robbery statutes. In Heflin v. United States, 358 U.S. 415, 419-20 (1959), this Court held that double jeopardy is violated by the imposition of consecutive sentences for the use of a dangerous weapon while robbing a bank under 18 U.S.C. Section 2313(d) and receipt of money taken from a bank under 18 U.S.C. Section 2113(c). This Court so held despite the presence

of different elements in the two sections of the statute. See id.; see also Prince v. United States, 352 U.S. 322, 327-29 (1957)(under 18 U.S.C. Section 2113, offense of entering a bank with felonious intent merges with offense of bank robbery if bank robbery is consummated, thus prohibiting consecutive sentences, despite different elements).

The analytical similarity between racketeering and racketeering conspiracy is comparable to the similarity between conspiracy in continuing criminal enterprise in the Jeffers case. As charged in Petitioner's case, the racketeering count required the same element of agreement that is an element of racketeering conspiracy. The indictment against Petitioner alleged an

association-in-fact enterprise that consisted of Petitioner, Michael Corbitt, James Keating and the three legal entities with which those individuals were associated. The racketeering conspiracy count charged that Petitioner, Corbitt and Keating agreed to conduct the affairs of that association-in-fact enterprise through a pattern of racketeering activity. The agreement needed to form the conspiracy also was necessary to the formation and continued existence of the association-in-fact. The only way the government could prove the existence of the association-in-fact was to prove that Petitioner, Corbitt and Keating agreed, either explicitly or implicitly, to form the enterprise which

the government charged was formed to commit the criminal acts alleged. Just as the defendants in Jeffers could not act in concert with one another without agreeing to do so, see 432 U.S. at 149-50, Petitioner, Corbitt and Keating could not associate with one another without agreeing to do so.

The Court of Appeals erroneously construes Petitioner's double jeopardy argument as relying solely on "an identity of evidence." See 978 F.2d at 285 (A-17). To the contrary, Petitioner consistently has argued that the elements of the racketeering and racketeering conspiracy counts were essentially the same, particularly given the analytical similarity between a conspiracy and an agreement to form an association-in-fact

enterprise.

However, despite the focus on the elements of two offenses, the courts frequently look to the charges and proof presented at trial in determining whether two offenses are distinct. Indeed, this Court noted in Jeffers: "The two indictments in this case are remarkably similar in detail. It is clear that the identical agreement and transactions over the identical time period were involved in the two cases." 432 U.S. at 150 n.16.

Similarly, in United States v. Sutton, 642 F.2d 1001, 1040 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981), the Court specifically held that "the proofs in this record showing these defendants

violated Section 1962(c) and 1962(d) [racketeering and racketeering conspiracy] were identical. Under these circumstances, we believe that the conspiracy convictions under Section 1962(d) merge with the Section 1962(c) convictions for the purposes of sentence." And, in United States v. Felix, ___U.S.___, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992), in which this Court rejected a double jeopardy challenge to a subsequent prosecution, this Court noted the many differences between the conduct charged in the two indictments: "The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses." See ___U.S. at ___, 112 S.Ct. at ___, 118 L.Ed.2d at 33.

In Petitioner's case, the conduct charged in the two counts and the evidence presented in support of those charges could not be more identical. Not one allegation contained in the racketeering count was not also contained in the conspiracy count, and vice versa. Although the Court of Appeals is correct in saying that an identity of evidence alone will not support a double jeopardy claim, here the identity of evidence, combined with the identity of allegations, combined with the virtual identity of elements does support Petitioner's double jeopardy argument.

The Court of Appeals for the Seventh Circuit claims that this Court's decisions in Felix, Missouri v. Hunter,

459 U.S. 359 (1983), and Albernaz v. United States, 450 U.S. 333 (1981) preclude Petitioner's double jeopardy challenge to the consecutive sentences. If the Court of Appeals is correct, then these decisions are in conflict with Jeffers, Heflin and Prince. However, Petitioner does not believe that Felix, Hunter and Albernaz preclude his claim. Although this Court stated in Felix that a substantive offense in a conspiracy to commit that offense are not the same for double jeopardy purposes, see 118 L.Ed.2d at 36, that statement was in the context of a subsequent prosecution case. The issue of consecutive sentences for choate and inchoate offenses was not raised in Felix. Even Garrett v. United States, 471 U.S. 773 (1985), which this Court

cited in Felix, does not preclude Petitioner's claim. Garrett involved cumulative punishment for a continuing criminal enterprise conviction and a separate conviction for an offense that was a predicate of the CCE count.* Garrett would control if Petitioner had been given consecutive sentences for racketeering and for a separate conviction for one of the predicate

*There is even a question as to whether consecutive sentences of this nature were involved in Garrett. As Justice Stevens noted in his dissenting opinion, Garrett received a five year sentence for a predicate conviction in Washington, a consecutive fourteen year sentence for predicate convictions in Florida, and a forty-year concurrent sentence on the CCE count. See 471 U.S. 773 at 807 n.27. The majority opinion suggests that the forty-year sentence was concurrent with the fourteen-year term but consecutive to the five-year term. See id. at 775, 777.

racketeering activities, e.g., bribery or conspiracy to murder. However, what raises the double jeopardy concern in Petitioner's case is that he received consecutive maximum sentences for racketeering and racketeering conspiracy convictions that involved identical conduct.

Missouri v. Hunter also does not control here. Although Hunter involved a single prosecution, the defendant received concurrent sentences for the two offenses that he claimed violated the Double Jeopardy Clause. See 459 U.S. at 361-62. Finally, Albernaz involved consecutive sentences, but they were imposed on two separate conspiracy counts charged under two separate conspiracy statutes. See 450 U.S. at 334. One

statute prohibited the importation of marijuana into the United States and the other statute prohibited distribution of marijuana within the United States. See id. In contrast, the indictment in Petitioner's case involved but one course of conduct that was charged in two separate counts. The essence of Count One was that Petitioner agreed to associate in fact with his co-defendants for the purpose of engaging in racketeering activity. The essence of Count Two was that Petitioner agreed to agree to associate in fact with the co-defendants for the same purpose. The two counts could not be more the same.

Petitioner's case also presents a variation on the double jeopardy issue

because the racketeering count was pre-Guidelines and the racketeering conspiracy count was sentenced under the Guidelines. The decision of the Court of Appeals stands in conflict with decisions of other circuits that have held that the Double Jeopardy Clause does not permit a court to impose a consecutive Guidelines sentence based on conduct that was already was considered in a pre-Guidelines sentence. In United States v. Scarano, 975 F.2d 580 (9th Cir. 1992), the Court vacated the defendant's sentences for social security fraud and mail fraud because the "district court both incorporated the losses from count two [pre-Guidelines] into its calculation of total losses for its Guidelines sentence on count one, and imposed consecutive

sentences." Id. at 586; see also United States v. Niven, 952 F.2d 289, 293 (9th Cir. 1991)("inclusion of the pre-Guidelines portion of the total loss when determining both the pre-Guidelines and Guidelines sentences potentially violates the Double Jeopardy Clause," where the sentences run consecutive).

In Petitioner's case, the conduct that was used to determine that he receive a consecutive maximum Guidelines sentence also was used to determine that Petitioner receive the statutory maximum on the pre-Guidelines count. As noted repeatedly, the conduct alleged in the two counts was identical, and the government neither charged nor proved any conduct of the Petitioner occurring after

the effective date of the Guidelines (November 1, 1987). The racketeering conspiracy count extended past that date only based on the government's allegation that the conspirators agreed to conceal their actions up to the date of the indictment in 1988 (and indefinitely). Therefore, this Court should grant Petitioner's writ to resolve the split in the circuits as to whether consecutive sentences for identical conduct contained in pre-Guidelines and Guidelines counts violates the Double Jeopardy Clause. This Court also should grant Petitioner's writ to resolve the uncertainty as to whether consecutive sentences are permitted for racketeering and racketeering conspiracy, particularly where the racketeering count is

predicated on an association-in-fact enterprise.

II. This Court Should Grant Petitioner's Writ to Resolve the Conflicts Within the Sentencing Guidelines With Respect to the Propriety of Consecutive Sentences for Guidelines and Pre-Guidelines Counts.

Even if the consecutive sentences imposed in this case did not violate the Double Jeopardy Clause of the Constitution, Petitioner contends that the Sentencing Guidelines do not permit the consecutive sentences imposed here. The Court of Appeals held, without discussion, that Section 5G1.2(d) requires that Petitioner's sentences run consecutive because the statutory maximums of twenty years on each count are less than the prescribed sentence of life imprisonment for level 43, which the

district court determined applicable to Petitioner's Count Two conviction under the Guidelines. See 978 F.2d at 284 (A-11). Because the court's intepretations carry broad ramifications for the imposition of consecutive sentences under the Guidelines, this Court should grant Petitioner's writ to correct the lower court's erroneous reading of the Guidelines.

The lower court's interpretation and application of the Guidelines is erroneous in three ways. The court's first error is in assuming that Section 5G1.2(d) automatically applies where one count is under the Guidelines and the other is pre-Guidelines. By their very nature, the Guidelines apply only to

offenses occurring after November 1, 1987. Thus, Section 5G1.2 applies only to sentencing on multiple counts of conviction, where all counts are under the Guidelines. The Court of Appeals erroneously assumed that Section 5G1.2 must apply where one count is pre-Guidelines. Nothing in the Guidelines supports that conclusion by the Court of Appeals. In fact, decisions from other courts have made clear that the decision to run a Guidelines count consecutive to a pre-Guidelines count is a discretionary one for the sentencing judge. See, e.g., United States v. Scarano, 975 F.2d 580, 586 (9th Cir. 1992).

Second, the Court of Appeals erroneously assumed that, if Section 5G1.2 can apply to combinations of

Guidelines and pre-Guidelines counts, no other sections of the Guidelines also apply to such combinations. If Section 5G1.2 applies even to pre-Guidelines counts, then other sections, such as those governing the grouping of counts, also must apply.

Third, the Court also erroneously concludes, albeit implicitly, that the dictates of Section 5G1.2 necessarily override the application of all other sections of the Guidelines. With respect to other Guidelines sections that apply to Petitioner's case (despite the inclusion of a pre-Guidelines count), the starting point is 28 U.S.C. Section 994(1)(2), which states in pertinent part: "The Commission shall insure that

the guidelines promulgated pursuant to subsection (a)(1) reflect...the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation."

The Sentencing Commission's directive is implemented in Section 3D1.2, which governs the grouping of closely-related counts. Application Note 4 to Section 3D1.2 states in part: "When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together."

If Section 3D1.2 is applied to

Petitioner's case, the two counts for which he was sentenced clearly would be grouped together. After applying the balance of Section 3D, Section 3D1.5 dictates that a sentencing judge use the combined offense level, after grouping, to determine the sentence in accordance with the provisions of Chapter 5. Because grouping the two counts would result in a single count of conviction, Section 5G1.1(a) would apply, resulting in the statutorily authorized maximum sentence of 20 years as the Guidelines sentence. And, applying the previously described restrictions on consecutive sentences for conspiracy and substantive offenses, the Guidelines sentence would run concurrently to the pre-Guidelines

sentence.

This approach is particularly appropriate in Petitioner's case because a consecutive Guidelines sentence was not necessary to punish conduct that occurred after the effective date of the Guidelines and thus could not be punished within the scope of the pre-Guidelines count. As noted earlier, the indictment in this case alleged no conduct after November 1, 1987, except a continuing conspiracy of silence. In fact, as the Court of Appeals noted in Petitioner's first appeal to the Seventh Circuit, the application of Section 5G1.2 is designed to give "maximum effect to the Guidelines within their intended domain, i.e., crimes committed after November 1, 1987." See United States v. Masters, 924 F.2d

1362, 1369 (7th Cir.), cert. denied, ___U.S.___, 111 S.Ct. 2019 (1991). Petitioner engaged in no conduct after November 1, 1987, although the conspiracy continued as one of concealment after that date. Thus, a consecutive sentence is not needed to give maximum effect to the Guidelines within their intended domain. Because all of Petitioner's conduct that was charged under the Guidelines count also was charged under the pre-Guidelines count (in fact the concealment of the conspiracy began in 1982 and ran up to November 1, 1987 and then beyond), giving maximum effect to the Guidelines is achieved by a concurrent sentence on the Guidelines count.

III. This Court Should Resolve the Split in the Circuits as to Whether a Sentencing Judge Must Consider Conduct of Which the Defendant was Acquitted But Which the Judge Finds to Have Occurred By Only a Preponderance of Evidence.

The sentencing judge in Petitioner's case determined that Petitioner should receive the statutory maximum sentence on the Guidelines count and that the Guidelines sentence must run consecutively to the pre-Guidelines sentence. The sentencing judge based this determination on a factual finding, by only a preponderance of evidence, that Petitioner was responsible for the murder of his wife, even though the jury found that Petitioner was not so liable. The Court of Appeals upheld the sentencing judge's decision in both respects: approving the reliance on acquitted

conduct and factual findings by only a preponderance of evidence. See 978 F.2d at 285-87 (A-19 - A-32). The lower court's decision is in conflict in both respects with decisions from other circuits. Given the tremendous signficance of sentencing hearings under the Sentencing Guidelines and the mandatory nature of factual findings under the Guidelines, this Court must resolve the split in the circuits on these important issues and clarify what a sentencing judge can rely on and by what standard a judge makes factual determinations.

A. Reliance on Acquitted Conduct

The flaws in the lower court's approval of the use of acquitted conduct

case, makes a factual finding that the defendant committed murder, even though the jury found that he was not responsible for the murder, then the Sentencing Guidelines mandate that the judge sentence him as if he had been convicted of murder. That is what violates due process, and it is that difference between Guidelines sentencing and pre-Guidelines sentencing that the Court of Appeals failed to recognize.

Second, the lower court also failed to see the distinction between using acquitted conduct to merely select a sentence within a guideline range and using acquitted conduct to select an entirely different and more serious guideline section. Petitioner does not dispute that all relevant conduct under

makes a factual finding that the defendant committed murder, even though the jury found that he was not responsible for the murder, then the Sentencing Guidelines mandate that the judge sentence him as if he had been convicted of murder. That is what violates due process, and it is that difference between Guidelines sentencing and pre-Guidelines sentencing that the Court of Appeals failed to recognize.

Second, the lower court also failed to see the distinction between using acquitted conduct to merely select a sentence within a guideline range and using acquitted conduct to select an entirely different and more serious guideline section. Petitioner does not dispute that all relevant conduct under

Section 1B1.3 should be considered in selecting a sentence within a guideline range. What Petitioner's case presents, however, is a radically different scenario. In Petitioner's case, the sentencing judge used acquitted conduct to select an entirely different guideline section -- murder instead of conspiracy to commit murder -- which resulted in a dramatic increase in the sentence mandated by the new guideline section.

The lower court's approval of the use of acquitted conduct in this manner not only violates due process, it puts the court's decision in conflict with United States v. Brady, 928 F.2d 844 (9th Cir. 1991). In Brady, the court persuasively stated:

> We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. The Guidelines recognize that voluntary manslaughter is to be punished less severely than murder by setting a lower base offense level for voluntary manslaughter than for murder. A sentencing judge should not be allowed to circumvent this statutory directive by making a finding of fact -- under any standard of proof -- that the jury has necessarily rejected by its judgment of acquittal.

928 F.2d at 851. Although the court in Brady based its decision on statutory and not constitutional grounds, see id. at 852 n.14, the tone of the Brady decision is clearly consistent with Petitioner's due process argument. This Court should grant Petitioner's writ to resolve this split in the circuits concerning the use of acquitted conduct under the Guidelines.

B. Use of a Preponderance Standard of Proof

Even if the reliance on acquitted conduct does not violate the Constitution, the use of a preponderance standard for factual findings does violate due process where the result of those findings is a dramatic increase in the sentence. The lower court's rejection of Petitioner's argument again puts its decision in conflict with the decisions of other circuits. This Court should grant Petitioner's writ to resolve that split in the circuits and to clarify this critical issue concerning standard of proof at Guidelines sentencing hearings.

Citing this Court's decision in McMillan v. Pennsylvania, 477 U.S. 79

(1986), the lower court claims that a preponderance standard at a sentencing hearing always satisfies due process. See 978 F.2d at 286 (A-22). Not only did the Court of Appeals again ignore the difference between Guidelines sentencing, which mandates a particular sentence based on a factual finding, and pre-Guideline sentencing, where factual findings did not mandate a particular result, but the Court of Appeals oversimplified this Court's decision in McMillan.

In McMillan, this Court made it clear that the government's power to enhance a sentence on the basis of a factor proved by a preponderance of evidence does not allow the government to punish a defendant for an offense without proving

the elements of that offense beyond a reasonable doubt. See 477 U.S. at 84-90. Although this Court upheld in McMillan the imposition of a minimum sentence on the basis of a sentencing factor, other language in the decision clearly indicated that this Court would not have approved sentencing on a preponderance standard for an entirely distinct offense that carried a dramatically longer sentence. This Court noted that the statute in question in McMillan "only becomes applicable after the defendant has been duly convicted of the crime for which he is to be punished." 477 U.S. at 87. The statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling

for a separate penalty...." Id. at 87-88. The statute "'ups the ante' for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense." Id. at 88.

Elsewhere in McMillan, this Court noted that the statute there was different than the statute invalidated in Mullaney v. Wilbur, 421 U.S. 684 (1975). In Mullaney, "once the State proved the elements which Maine required it to prove beyond a reasonable doubt, the defendant faced 'a differential in sentencing range from a nominal fine to a mandatory life

sentence.'" 477 U.S. at 87 (quoting Mullaney, 421 U.S. at 700).

Although Mullaney involved a statute that required a defendant to prove a mitigating factor at trial, the analysis in Mullaney applies as well to the sentencing process. In Mullaney, this Court noted that the State of Maine sought to limit the holding of In re Winship, 397 U.S. 358 (1970) "to those facts which, if not proved, would wholly exonerate the defendant." 421 U.S. at 697. This Court responded:

> This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor.

Because the former are less "blameworth[y]," ...they are subject to substantially less severe penalties....

The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differs significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on

the extent of punishment.

421 U.S. at 697-98 (citation omitted).

This Court's language in Mullaney speaks volumes in Petitioner's case. Under the lower court's interpretation and application of the Guidelines, Petitioner can be punished for murder, even though the government has established liability for murder only by a preponderance of evidence after a jury refused to convict beyond a reasonable doubt. Rather than being a distinct offense -- indeed the most serious imaginable -- that the government must prove beyond a reasonable doubt, the murder became nothing more than a sentencing factor that is used to determine the extent of Petitioner's punishment under the Guidelines. Under

the lower court's interpretation of the Guidelines, a defendant convicted of one offense can be sentenced on the basis of every other offense having some connection to the offense of conviction, even though the defendant was never charged, tried or convicted of the other offenses. For example, a defendant could be convicted of 20 counts of mail fraud (based on 20 separate mailings) that relate to the collection of life insurance proceeds, and then be sentenced to 100 years in prison (five year maximum sentences on each count, all running consecutively), based on a finding by a preponderance of evidence that the defendant was responsible for the murder of the life insurance policyholder.

Petitioner's case implicates the Due Process Clause because of the dramatic increase in his sentence based only on a preponderance of evidence finding. As Petitioner contended below, his Guidelines sentence should have been based on Section 2A2.1 of the 1988 version of the Guidelines, which was the version in effect at the time of Petitioner's original sentencing in 1989.*

*The trial court applied the version of the Guidelines that became effective November 1, 1990, which were in effect at the time of Petitioner's resentencing in 1991. The 1991 Guidelines moved conspiracy to commit murder from Section 2A2.1 to a new section 2A1.5. Section 2A1.5 increased the base offense level from 20 to 28, and directed that conspiracies that resulted in the death of a victim be sentenced under the first degree murder guideline section, 2A1.1. The lower courts rejected Petitioner's argument that the Ex Post Facto Clause of the Constitution barred the sentencing judge from applying the new guideline, since it dramatically increased the

footnote cont'd
offense level for conspiracy to commit murder. See Miller v. Florida, 482 U.S. 423 (1987); see also Questions Most Frequently Asked About the Sentencing Guidelines, Appendix E at Question No. 71 (November 1990). The lower court's conclusion that Amendment 311, which changed the offense level for a conspiracy to commit murder, was merely a clarifying amendment and thus could be applied retroactively, is definitively rebutted by the commentary to Amendment 311: "This amendment restructures Section 2A2.1 and increases the offense level for attempted murder and assault with attempt to commit murder where the intended offense, if successful, would have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline (Section 2A1.5) is inserted to cover conspiracy or solicitation to commit murder." Because the newer version of the Guidelines dramatically increased the sentence for conspiracy to commit murder, its application in Petitioner's case violated the Ex Post Facto Clause. This Court should grant Petitioner's writ if for no other reason than to clarify this aspect of the Sentencing Guidelines.

Under the 1988 version of Section 2A2.1, the base offense level for conspiracy or solicitation to commit murder is 20. Various enhancements are listed, but the commentary clearly states that the enhancements do not apply where the offense of conviction is a mere solicitation. Thus, Petitioner has consistently contended that his base offense level under Section 2A2.1 would be 20. Even conceding two separate two-level increases that the sentencing judge derived from Chapter 3 of the Guidelines (two-level increase for being an organizer and two-level increase for obstructing the investigation), Petitioner's offense level would be 24, which would result in a sentence of 51-63 months, to run concurrently to his Count

One sentence of twenty years.

In contrast, simply by making a factual finding by a preponderance of evidence that Petitioner was responsible for his wife's murder, the sentencing judge was compelled by the Guidelines to assign Petitioner an offense level of 43, which calls for life imprisonment under the Guidelines. The trial court then concluded that, in order to approach a sentence of life imprisonment, the Court had to sentence Petitioner to the statutory maximum of twenty years and then run that sentence consecutively to the pre-Guidelines sentence. Thus, based only on a finding by a preponderance of evidence, the sentencing judge inflated Petitioner's sentence from no increase at

all (5 years concurrent with the pre-Guidelines sentence) to twenty years which was then added to the pre-Guidelines sentence. When the Guidelines result in such a dramatic increase in a sentence such as in Petitioner's case, the factual findings at sentencing become the "tail which wags the dog of the substantive offense." McMillan v. Pennsylvania, 477 U.S. at 88. That inbalance in the process is what this Court found violative of due process in Mullaney and is equally violative of due process here.

The lower court's opinion also is in conflict with the decisions of other circuits on this issue. In United States v. Kikumura, 918 F.2d 1084, 1100-02 (3d Cir. 1990), the court held that a clear

and convincing standard of proof must be used before a judge can impose such a dramatic increase in a Guidelines sentence. Likewise, in United States v. Townley, 929 F.2d 365, 369-70 (8th Cir. 1991), the court was faced with an eighteen-level increase in the defendant's base offense level and a seven-fold increase in the permissible sentencing range. Although not explicitly adopting a clear and convincing standard, the court stated in Townley that "due process conceivably could require more than a mere preponderance....We do not foreclose the possibility that in an exceptional case, such as this one, the clear and convincing standard adopted by our sister

circuit might apply." Id. at 369, 370.

Petitioner's case presents one of the most important issues to come out of the Sentencing Guidelines. Because the results of factual findings mandate the selection of specific offense levels, the questions of the standard of proof and the reliance on acquitted conduct are of supreme importance. One simple factual finding, rejected by the jury, has resulted in a mandatory and dramatic increase in a defendant's sentence, despite the lack of any evidence beyond a preponderance. Petitioner has been sentenced as if convicted of the most serious offense imaginable, despite the jury's rejection of the government's proof. This Court should grant Petitioner's writ to correct this

injustice and prevent the Sentencing Guidelines from being so wrongly interpreted for future defendants.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[Opinion of the United States Court of Appeals for the Seventh Circuit in United States v. Masters]

Before BAUER, Chief Judge, EASTERBROOK, Circuit Judge, and WOOD, Jr., Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Judges and genies have this in common: by granting supplicants exactly what they wish for, they may produce misery and regret. Eakin v. Continental Illinois National Bank, 875 F.2d 114, 118 (7th Cir. 1989). Alan Masters, sentenced to 40 years in prison for racketeering activities that ran the gamut from protecting bookies to soliciting the murder of his wife, asked to be resentenced under the sentencing guidelines. He had received the maximum sentence for the crimes of which he had been convicted (consecutive 20-year

terms) and believed that the guidelines required a lower sentence. We granted his wish. 924 F.2d 1362, 1369 (7th Cir. 1991). Once again the district court selected a 40-year term--but with a big difference. Under the first sentence, Masters was eligible for parole after 10 years, and a well-behaved prisoner had to be released after serving two-thirds of his sentence, shortened by 120 days of good time credit per year. 18 U.S.C. Sections 4161, 4205(a), 4206(d) (1976) ed.). Imprisonment under the Sentencing Reform Act of of 1984, by contrast, comes without possibility of parole, and a prisoner earns good time at a maximum rate of 54 days per year. 18 U.S.C. Section 3624(b). Masters now rues his

request and appeals again. So does his henchman James Keating, who on the first appeal adopted Masters' arguments but now disclaims any desire for a guideline sentence.

On the first appeal Keating adopted all of Masters' arguments, adding a few of his own. We understood him to seek resentencing under the guidelines and remanded so that the district judge could determine whether the conspiracy ended before November 1, 1987, the date the new sentencing system took effect. Keating did not seek rehearing, and in the district court he clamored for the benefit of the guidelines--until he saw how the prosecutor calculated the guideline sentence for Masters. Then he yanked his request and insisted that he

had never wanted resentencing. Too late. By adopting all of Masters' arguments on the first appeal, Keating invited what happened. If he believed that we misunderstood the effect of this adoption, he should have asked the first panel to rescind the portion of the judgment remanding his case. Instead he embraced the remand, and the recalculation, until the numbers turned sour.

Masters concedes that his criminal enterprise continued into the period covered by the Sentencing Reform Act. Keating submits that he dropped out before November 1, 1987. The jury convicted Keating on an indictment charging that the conspiracy continued

through mid-1988. Never during trial, at the initial sentencing, or on the first appeal, did Keating say that he withdrew at any earlier date. In his initial filing after remand, Keating told the district court: "There is no evidence that your Petitioner withdrew from the conspiracy. Therefore, the conspiracy continued after November 1, 1987." Keating changed his tune when he realized the effect of the guidelines, but he was right on the facts: there is no evidence that he withdrew, and the district judge so found. He took no step to end the criminal adventure or report its operations to the authorities, did not make a clear break of it and thus did not withdraw under the demanding standard of the criminal law. United States v.

Patel, 879 F.2d 292 (7th Cir. 1989). As Keating's remaining arguments track Masters', we need not mention him again.

Masters was convicted of racketeering and conspiracy to commit racketeering. Only the latter offense lasted into the guideline era. Masters contends that a court should start with Section 2E1.1, which applies to racketeering conspiracies. That guideline provides a base offense level of 19 or the level appropriate to the substantive crime, whichever is greater. Because in Masters' view that offense was solicitation to commit murder, the substantive guideline is Section 2A2.1. (Rather, was Section 2A2.1, as that guideline existed before amendment 311.)

Guideline 2A2.1 provided a base offense level of 20. Masters submits that because Section 2E1.1 lists no adjustments, none can be made. Combining an offense level of 20 with his criminal history category of I produces a guideline range of 33-41 months. Because he received more than that for the racketeering offense, Masters concludes that the guideline sentence for the conspiracy is effectively zero, running concurrently with the substantive RICO sentence. See U.S.S.G. Section 5G1.2(c).

The district judge saw things differently. He calculated the sentence in three ways, each of which produced 40 years' imprisonment. Each of the three depends to some degree on his finding that Masters "is directly responsible for

the murder of his wife." The judge so found even though the jury did not answer a special interrogatory asking about the murder. Masters contends that this omission produced an implicit acquittal, an argument to which we return.

1. Section 2E1.1(a)(2) calls for use of "the offense level applicable to the underlying racketeering activity." Not the base offense level, as Masters would have it, but the whole offense level. Guideline 2X1.1(a) drives home this point, providing that in cases of attempt, solicitation, and conspiracy that fall outside other guidelines, the court should use the "base offense level from the guideline for the substantive offense, plus any adjustments from such

guideline for any intended offense conduct that can be established with reasonable certainty." Then Section 2X1.1(b) provides some increases on top of the "base" level computed in this way. Starting from the base of 20 in the former version of Section 2A2.1, the district judge added 2 levels for more than minimal planning (Section 2A2.1(b)(1)), 9 levels for the use of a firearm to inflict bodily injury on Dianne Masters (Section 2A2.1(b)(2), (3)), and 2 more levels for paying money to other persons in connection with the crime (Section 2A2.1(b)(4)). Thus the district judge arrived at 33 within Section 2A2.1 itself. Then he turned to generally applicable enhancements: 2 levels because Mrs. Masters was

physically restrained (Section 3A1.3), 2 levels because Masters was the organizer or leader of the conspiracy (Section 3B1.1(c)), and 2 levels for obstruction of justice (Section 3C1.1). Level 39 yields a sentencing range of 262-327 months. Nothing in the computation thus far reflects the victim's death. Because Dianne Masters died and Alan Masters was responsible, the judge concluded that an upward departure to 480 months is appropriate. See U.S.S.G. Section 5K2.1, providing that departure is in order when a death results.

2. Section 2E1.1(a)(2) refers to "the offense level applicable to the underlying racketeering activity." Instead of turning to the guideline for

conspiracy to commit murder, as in the prior method, one may turn to the guideline for murder, Section 2A1.1. The base offense level for murder is 43. Life imprisonment is the sentence prescribed for level 43 offenses. To come as close to life imprisonment as possible, the court gave consecutive maximum sentences on each count, for a total of 40 years. Guideline 5G1.2(d) requires this approach.

3. Amendment 311, effective November 1, 1990, moved conspiracy to commit murder from Section 2A1.5. This guideline says that "[i]f the offense resulted in the death of a victim, apply Section 2A1.1 (First Degree Murder)." U.S.S.G. Section 2A1.5(c)(1). That takes us straight to Method 2. Congress

provided that courts must apply the guidelines "that are in effect on the date the defendant is sentenced". 18 U.S.C. Section 3553(a)(4). Masters was sentenced before amendment 311 but resentenced after its adoption. He contends that the ex post facto clause of the Constitution prevents the court from applying this amendment to him. But see United States v. Bader, 956 F.2d 708 (7th Cir. 1992). Sidestepping this contention, the district court treated amendment 311 as clarifying rather than changing the law--as demonstrating, in other words, that Method 2 has been the right one all along.

Like the district judge, we conclude that Method 2 is proper. Methods 1 and 3

reinforce the result, demonstrating the (rough) internal consistency of the guidelines. Masters insists that the guidelines implement a charge-offense system and observes that he was neither charged with nor convicted of murder. True enough, the Sentencing Commission rejected real-offense sentencing as impractical, see Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1, 8-12 (1988); Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J.Crim.L. & Criminology 883, 914-25 (1990). The guidelines start with the offense of conviction. U.S.S.G. Section 1B1.2(a); United States v. Missick, 875 F.2d 1294, 1302 (7th Cir. 1989). But

real-offense principles influence not only the aggravating and mitigating factors but also the definition of relevant conduct under Section 1B1.3. William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L.Rev. 495 (1990); Nagel, 80 J.Crim.L. & Criminology at 925-27. For example, the guidelines use the full quantity of drugs sold or loot stolen in a single scheme or course of conduct, not just the amount the prosecutor names in the indictment, to determine the seriousness of an offense. U.S.S.G. Section 1B1.3(a)(2); United States v. White, 888 F.2d 490 (7th Cir. 1989).

Cross-references within the guidelines

introduce real-offense principles into the charge-offense system. United States v. Davern, 970 F.2d 1490 (6th Cir. 1992)(in banc). Section 2E1.1(a)(2), which requires the court to use "the offense level applicable to the underlying racketeering activity", speaks of the underlying activity and not an underlying conviction. Often there will be no other conviction, and the existence of one in this case does not change the nature of the cross-reference. Section 1B1.3(a)(iii) says that "cross references in Chapter Two ... shall be determined on the basis of the following: (1) all acts and omissions committed and aided or abetted by the defendant ... that occurred during the commission of the offense of conviction". The murder of

Dianne Masters occurred during the racketeering conspiracy. So Section 2E1.1(a)(2), read from the perspective of Section 1B1.3(a), directs the court to the murder guideline rather than the solicitation guideline. At least it does this if the court's finding that Masters is responsible for his wife's murder is sustainable, and the process is otherwise consistent with the Constitution.

Masters tries to knock out the entire guideline sentence with the argument that consecutive terms for racketeering and racketeering conspiracy violate the double jeopardy clause. How could this be, given the ancient principle that choate and inchoate crimes may be punished separately? United

States v. Felix, ___U.S.___, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992). An overlap in the evidence used to prove the two crimes does not matter; the elements of the offense, and not the evidence used to prove these elements, identify separate crimes. Id. ___U.S. at ____-____, 112 S.Ct. at 1382-83. Then there is the further rule that cumulative punishment is always consistent with the double jeopardy clause, provided there is but a single trial. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); Albernaz v. United States, 450 U.S. 333, 343-44, 101 S.Ct. 1137, 1144-45, 67 L.Ed.2d 275 (1981). According to Masters, because racketeering is an organized activity, it is impossible to be a racketeer and not be a conspirator.

Provided there is only one trial, it is a matter of nomenclature whether the legislature says that a particular enterprise violates two laws, each punishable by 20 years' imprisonment, or one law punishable by 40 years' imprisonment. Masters does not contend that consecutive sentences for racketeering and racketeering conspiracy are impermissible under the "elements" approach used since Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to decide when criminal statutes establish separate offenses. He urges identity of evidence, not identity of elements. Felix, Albernaz, and Hunter, sink that contention.

To make headway, Masters needs to

upset the district judge's finding that he is responsible for the murder of his wife. Plenty of evidence supports the finding, but Masters insists that the judge had no business reexamining the jury's acquittal. The judge submitted to the jury a set of verdict forms listing "racketeering activities" in which Masters may have engaged. The jurors checked off lines indicating findings that Masters planned and solicited the murder of his wife and participated in the overall racketeering enterprise. They left blank a line concerning the actual murder. Masters treats this omission as a finding that he is not responsible; the prosecutor replies that the jury, having found all it needed to, decided not to resolve the question.

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), which uses an "implicit acquittal" approach similar to the one Masters espouses, could limit the prosecutor's ability to try Masters for the crime of murder. But of course the prosecutor does not want to try him for that offense. Our dispute concerns the selection of a sentence for the crime of conspiracy. A sentence at the top of the statutory range does not punish Masters for a crime he didn't commit; it uses all available information about his character and dangerousness in choosing the sentence for the crime of which he stands convicted. Judges have been considering defendants' activities and character since long before there

were guidelines, with consistent approval from the highest court. E.g., Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980); United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978); Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); Williams v. New York, 337 U.S. 241 (1949); see also Chapman v. United States, ___U.S.___, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); United States v. Pinto, 875 F.2d 143 (7th Cir. 1989). This is one reason why we have held that judges may take other crimes into account when selecting a sentence under the guidelines, even if the defendant has been charged with and acquitted of those crimes. United States v. Fonner, 920 F.2d 1330, 1332-34 (7th

Cir. 1990); see also, e.g., United States v. Morrison, 946 F.2d 484, 501 (7th Cir. 1991); United States v. Welch, 945 F.2d 1378, 1385 (7th Cir. 1991); United States v. Lawrence, 934 F.2d 868, 873-74 (7th Cir. 1991), id. at 875 (concurring opinion). An acquittal means that the charge was not proven beyond a reasonable doubt; it does not mean that the defendant didn't do it. Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). We recognize that a divided panel of the ninth circuit has forbidden district judges to consider conduct of which a person has been acquitted, United States v. Brady, 928 F.2d 844 (9th Cir. 1991), but we have previously announced our

disagreement with that court's conclusion. United States v. Smith, 953 F.2d 1060, 1066 (7th Cir. 1992).

All that remains is Masters' contention that in considering whether a defendant committed some other offense, courts should use a standard more exacting than the preponderance of the evidence. As a constitutional argument this goes nowhere. McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), holds that the preponderance standard satisfies the due process clause. We have applied this holding to sentencing under the federal guidelines. United States v. Ebbole, 917 F.2d 1495 (7th Cir. 1990). Similarly, the Supreme Court has concluded that the preponderance standard is appropriate

when deciding whether to use other crimes evidence at trial. Huddleston v. United States, 485 U.S. 681, 690 (1988). The district judge used the preponderance standard when concluding that Masters is responsible for his wife's murder, and this was entirely proper. Conviction at trial supplies all of the justification the Constitution requires for depriving the defendant of liberty for any term up to the maximum prescribed by statute. How much of that time to grant back in sentencing, and what procedures to use when doing so, are legislative rather than constitutional choices given McMillan and its many predecessors.

Contemporaneously with our decision in Ebbole, the third circuit concluded that

when the findings made at sentencing transform the offense of conviction into something much more grave, and with a much more severe penalty, the court sould use an enhanced burden of persuasion. United States v. Kikumura, 918 F.2d 1084, 1098-1102 (3d Cir. 1990). Kikumura was convicted of transporting explosives across state lines, with a guideine range of 27-33 months. The district judge concluded that Kikumura planned to use the bombs to kill scores of people and departed upward to the statutory maximum sentence, 30 years. This twelve-fold increase in the punishment, the court of appeals concluded, required greater confidence than the preponderance of the evidence.

Although Kikumura expressed this conclusion in constitutional terms, it is impossible to square such a holding with McMillan--or with the history of discretionary sentencing in the United States. Before November 1, 1987, some federal judges regularly sentenced defendants to the maximum terms provided by law, and tacked sentences consecutively, on hunch and whim. A few even acquired sobriquets such as "Maximum John" (Judge Sirica, of Watergate fame). Others rejected deterrence and desert as justifications of imprisonment and gave sentences reflecting disparate views about rehabilitation. States occasionally adopted indeterminate sentencing systems. For some years in California every felony carried a term of

life, with release in the discretion of the Adult Authority. Zero-to-life sentences meant that everything lay in the hands of persons who were scarcely obliged to consider evidence, let alone to weigh it carefully. See Marvin Zalman, The Rise and Fall of the Indeterminate Sentence, 24 Wayne L.Rev. 45 (1977). The guidelines represent a reaction against vesting such discretion in the hands of persons who may have dramatically different ideas about punishment. Yet they hardly exemplify a consensus that in 1987 what had been the norm in 20th Century sentencing became constitutionally repulsive. See United States v. Silverman, 976 F.2d 1502 (6th Cir. 1992)(in banc)(constitutional rules

applicable to pre-guideline sentencing, including the preponderance standard, still govern); United States v. Galloway, 976 F.2d 414 (8th Cir. 1992)(in banc)(same); United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991)(in banc)(same); cf. United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (in banc) (confrontation clause does not apply at sentencing under the guidelines). While sentencing practices have cycled, from fixed terms in the 19th Century to discretion in the middle 20th Century to guided discretion in the late 20th Century, the due process clause has remained the same. It is statutes, rules, practices, and ideas about criminology that have changed. Rather than treating the Constitution as

paraffin that may be poured into a mold suiting current tastes, courts properly look to these statutes, rules, and practices. The living legal community, and not an imagined decision imputed to those long departed, is responsible for contemporary sentencing practices.

No one can deny that the guidelines, coupled with recent increases in the maximum terms for many offenses, have increased the importance of sentencing vis-a-vis trials. We have indicated some sympathy with the conclusion that when sentencing becomes the dog and the trial the tail, judges should borrow some of the devices used at trial to protect the defendant's interests and improve accuracy (two objectives that are not

always compatible). See United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992); United States v. Schuster, 948 F.2d 313, 315 (7th Cir. 1991). Cf. United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991)(concurring opinion). Neither the Sentencing Reform Act nor the guidelines specifies a burden of persuasion, so courts must devise their own. We are free to modify this standard as wisdom gained from experience suggests. But the preponderance standard remains the norm--in sentencing, as in almost all litigation, because it treats errors in either direction as equally costly. Grogan v. Garner, ___U.S.___, ___, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 103 S.Ct. 683, 691-92,

74 L.Ed.2d 548 (1983). An excessive sentence injures the defendant, but an insufficient sentence injures society, especially persons who may be victims of crime tomorrow if courts do too little to deter and incapacitate criminals today.

Nothing about Masters' sentencing suggests any need for an enhanced burden of persuasion. Taking an offender's other crimes into account is, as we have remarked, an old practice indeed. The district judge obviously took the murder into account when imposing consecutive 20-year terms in what he supposed was a pre-guideine sentence. On remand, the district judge reimposed these terms under the guidelines. Here we find no dramatic alteration of the roles of trial

and sentence. True, the guideline sentence means no parole and lesser good-time credits, but these statutory changes dod not alter the balance between trial and sentencing. Working through the guideines after the fashion of Method 1 also shows the difference between our case and Kikumura: instead of departing upward by an order of magnitude, the district judge here used the finding of murder to support a four-level departure, from level 39 to level 43. So we may defer until another day the decision whether development in a common-law fashion ever would lead to the use of a clear-and-convincing standard in sentencing. Finding murder by a preponderance of the evidence violated none of Masters' rights.

AFFIRMED.

(JUDGMENT ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT).

Entered on November 9, 1992

Case no. 91-2985

Before BAUER, Chief Judge, EASTERBROOK, Circuit Judge and WOOD, Senior Circuit Judge.

PER CURIAM:

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on October 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

SENTENCING GUIDELINES SECTIONS

2A2.1 Assault with Intent to Commit Murder: Conspiracy or Solicitation to Commit Murder; Attempted Murder

(a) Base Offense Level: 20

(b) Specific Offense Characteristics

(1) If an assault involved more than minimal planning, increase by 2 levels.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6

(4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

3D1.2. Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of Sections 3D1.2-3D1.5. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts

or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. Section 994(1)(2).

5G1.1. Sentencing on a Single Count of Conviction.

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideine range, the statutorily required minimum sentence shall be

the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence --

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

5G1.2. Sentence on Multiple Counts of Conviction

(a) The sentence to be imposed on a count for which the statute mandates a consecutive sentence shall be determined and imposed independently.

(b) Except as otherwise required by law (see Section 5G1.1(a),(b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.